90-596

No. 90-_____

IN THE

Supreme Court of the United States

October Term, 1990

THOMAS O. CANITIA,
Petitioner,

vs.

YELLOW FREIGHT SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner, an employee subpoenaed by a former co-worker to testify adverse to his employer's position in a race discrimination trial, alleges he was retaliatorily discharged because of his participation in a Title VII proceeding. Based upon the disposition by the courts below the following questions are presented for review:

1. Does Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, require a Plaintiff to prove a pattern of retaliation in order to establish a *prima facie* case of retaliation?

2. Under the summary judgment trilogy of *Anderson v. Liberty Lobby, Inc.*[1], *Matsushita Electric Industrial*

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[1] 477 U.S. 242, 106 S.Ct. 2505 (1986).

Co., Ltd. v. Zenith Radio Corp.[1], and *Celotex Corp. v. Catrett*[3] what is the burden of a non-moving Plaintiff in resisting summary judgment on issues of motive and intent?

3. Where discipline is imposed based upon subjective criteria what weight, if any, should be given by federal courts to the disposition of a collective bargaining grievance at the summary judgment stage of a Title VII retaliation case?

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[1] 475 U.S. 574, 106 S.Ct. 1348 (1986).

[3] 477 U.S. 317, 106 S.Ct. 2548 (1986).

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No. 90 -_____

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THOMAS O. CANITIA,[1]

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vs.

YELLOW FREIGHT SYSTEMS, INC.,

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PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of *certiorari* issue to the United States Court of Appeals for the Sixth Circuit to review the judgment on rehearing in this case filed on May 22, 1990.

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[1] All parties to this action are identified in the caption.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit on rehearing is reported at 903 F.2d 1064. It is reprinted in the Appendix at A 1 - A 10. The initial opinion of the United States Court of Appeals for the Sixth Circuit is reported at 894 F.2d 196. (Appendix at A 17 - A 23). The denial of further rehearing by the United States Court of Appeals for the Sixth Circuit is not officially reported. (Appendix at A 11 - A 12).

The opinions of the United States District Court for the Northern District of Ohio of October 31, 1988 (Appendix at A 24 - A 35) and January 4, 1989 (Appendix at A 41 - A 43) are not officially reported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. Section 1254(1) to review a civil judgment.

RELEVANT STATUTORY PROVISIONS

42 U.S.C. Section 2000e-3(a).

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF THE CASE

In late January of 1986, Thomas O. Canitia ["Canitia"], an employee of Yellow Freight Systems, Inc. ["YFS"] was subpoenaed to testify on behalf of a plaintiff at a race discrimination trial

against YFS. Canitia testified in *Few v. Yellow Freight Systems, Inc.*[5], giving testimony critical to plaintiff's success. The trial court in *Few* issued its opinion in April of 1986 and shortly thereafter Canitia began to receive informal warning letters[6] with frequency from YFS.

Canitia, a city driver for YFS at the time of these events, was a bargaining unit member during his 13 years of employment with YFS. Under the

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[5] The *Few* case raised claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-*et seq.*, and 42 U.S.C. Section 1981. The trial opinion appears in an unofficial reporter system. *Few v. Yellow Freight Systems, Inc.*, 40 EPD Para. 36,131 (N.D. Ohio 1986), aff'd 845 F.2d 123 (6th Cir. 1988).

[6] Under the applicable collective bargaining agreement an employee can protest a warning letter. The warning letters may or may not lead to discipline.

applicable collective bargaining agreement YFS was precluded from basing discipline on events or warning letters more than nine (9) months old.

There is a sharp contrast between YFS's consideration and treatment of warning letters Canitia received before and after his testimony. Canitia received eight (8) warning letters between January 1, 1985 and August 30, 1985 with no disciplinary action imposed. However, following his testimony in *Few* Canitia received a one (1) day suspension on July 2, 1986 based upon YFS's review of "his overall work record" which contained six (6) warning letters in the last nine (9) month period.[7] On August

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[7] All of the warning letters except for one (1) were issued after the decision in *Few v. Yellow Freight Systems, Inc.*, on April 24, 1986.

14, 1986, the suspension was upheld in the grievance process. The next day Canitia was informed by management, *inter alia*, that normal progressive discipline could be bypassed and that YFS would go directly to discharge. Significantly, during this meeting Canitia alleges that terminal manager Marino alluded to his testimony in *Few*. Of equal significance is the fact that Marino denies referring to his testimony.

Although Canitia's performance was impeccable in terms of paperwork and company procedures, YFS management was not content with the small warning infractions[1]. In late October of 1986,

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[1] YFS's management employees not surprisingly denied any retaliatory motive for scrutinizing Plaintiff. Their claimed intent was to improve his performance after 13 years of service with the employer.

for no apparent reason, YFS undertook intensive surveillance of Canitia's activities, although he had received only a single warning letter between July and October. The managers assigned to the city drivers followed Canitia on secondary runs for pick-up and delivery. No other city driver or employee of YFS's Cleveland terminal received similar scrutiny according to the terminal manager and city operations manager of YFS. In addition, an outside "spotting" firm was assigned to follow Canitia, to attempt to discover instances in which he was "abusing company time", and file detailed reports on his activities.

In each instance of surveillance Canitia never deviated from his assigned routes or duties. The only criticism of

Canitia's performance was that he took slightly more time to do a double drop and hook than YFS management thought was required.[1] This subjective criteria was the basis for both discharge decisions by YFS; decisions which ultimately gave rise to this controversy.

On November 4, 1986, nine (9) months after his testimony in *Few*, Canitia was terminated for reasons that were unprecedented at YFS's Cleveland terminal. In addition to pursuing a grievance, Canitia filed a charge of retaliation against YFS with the United States Equal Employment Opportunity

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[1] Driver manifests show that the time Canitia spent on the entire round trip was approximately 20 minutes longer than the average of some other drivers. YFS was unable to identify through any of its management officials how much time constituted "unreasonable abuse".

Commission ["EEOC"] on November 17, 1986. As a result of the grievance process, Canitia was reinstated on this first discharge on December 1, 1986. YFS placed Canitia under the identical type of surveillance shortly after his return to work. Based upon a subjective, vague, and unexplained "too much time at a stop" he was again terminated December 26, 1986.

Canitia amended his retaliation charge with the EEOC on January 8, 1987 to include the second and final discharge. Based on this charge Canitia filed suit[10] seeking reinstatement, and other equitable relief pursuant to Title

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[10] Jurisdiction of the district court was invoked pursuant to 28 U.S.C. Sections 1331, 1343 and 42 U.S.C. Sections 2000e-5(f)(2),(f)(3) and (g).

VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-*et seq.*

After several procedural matters were resolved and discovery was undertaken, including the inspection of over 58,000 Driver Manifests, and copying of approximately 5,000 selected manifests, Defendant YFS filed a motion for summary judgment on October 14, 1988. The motion, filed pursuant to Rule 56, Federal Rules of Civil Procedure, was premised on the subjective reasons advanced by YFS management as the legitimate non-discriminatory reason for the termination, and the failure of Canitia to succeed in the grievance process following his second discharge.

In opposition to YFS's motion for summary judgment, Canitia submitted

nearly 300 Driver Manifests[11]. These demonstrated that for the same period of time there were many city drivers who spent more time at stops and yet had fewer bills than Canitia. None of these drivers received any warning letters, discipline or other scrutiny from YFS's terminal management. This disparate treatment highlighted the subjective nature of YFS's discharge criteria.

Given the volume of documents involved, Canitia sought additional time to respond to YFS's motion. When this was denied, Canitia moved to alter and amend the district court's judgment of October 31, 1988 granting summary

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[11] Each city driver is required to fill in a Driver Manifest for each run which shows the: 1) time of arrival and departure from each stop; 2) location of each pickup by company; and 3) number of bills included in the pickup.

judgment. (Appendix at A 24 - A 35). The district court vacated its judgment order (Appendix at A 38 - A 40). Without a single change to address any of Canitia's opposition to summary judgment, on January 4, 1989 the district court merely re-entered its earlier order. (Appendix at A 41 - A 43).

Canitia filed a timely Notice of Appeal to the Sixth Circuit. Following briefing and oral argument, the court of appeals, on January 23, 1990, reversed the district court's grant of summary judgment. (Appendix at A 17 - A 23). On a petition for rehearing by YFS the court of appeals reversed itself on May 22, 1990. (Appendix at A 1 - A 10).

In its initial opinion the court of appeals determined that the issue was a

close call and therefore inappropriate for summary judgment. The opinion on rehearing, on which *certiorari* is sought, reverses the initial opinion and affirms the district court's grant of summary judgment. The Sixth Circuit denied Canitia's petition for rehearing or rehearing *en banc* on July 10, 1990. (Appendix at A 11 - A 12).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Significant Questions Related to a Title VII Plaintiff's Burden in Opposing Summary Judgment Which Have Not Been Decided by This Court.

A. This Court Must Address the Important Issue of Delineating the Appropriate Burden of Establishing a *Prima Facie* Retaliation Case at the Summary Judgment Stage.

Beginning with *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817

(1972), this Court has addressed and refined elements for establishing a *prima facie* case under Title VII of the Civil Rights Act of 1964, as amended ["Title VII"]. Notwithstanding the flexible approach given to the *McDonnell-Douglas* formulation, this Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981), addressed the elements and the burden of going forward with the evidence. In cases presenting specific issues, the Court has addressed not only the burden of proof, but also when the burden shifts and to whom. In *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843 (1977), this Court addressed the relative burdens on the merits of a disparate treatment claim involving a pattern or practice of racial

discrimination. The *Teamsters* opinion rejected the requirement that a plaintiff prove intent or motivation by direct evidence. 431 U.S. at 358, n. 44, 97 S.Ct. at 1866, n. 44. In *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478 (1983), this Court, once again, was presented with and rejected the attempt to engraft a direct evidence standard for proving discriminatory intent or motivation. As the Court noted in *Aikens*:

> ...[P]laintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.

460 U.S. at 714, n. 3, 103 S.Ct. at 1481, n. 3. The ultimate role of the factfinder is to evaluate and determine

the credibility of witnesses in deciding whether or not a plaintiff has sustained his burden of proof. In the context of determining YFS's motion for summary judgment, the courts below rejected this Court's teachings in *Teamsters* and *Aikens* by requiring Canitia to prove retaliation with direct evidence of motive and intent, and a pattern of retaliatory conduct.

The district court erroneously found that Canitia had presented no direct evidence of retaliatory motive in opposing summary judgment. (Appendix at A 32). The Sixth Circuit quoted this portion of the opinion with approval in its May 22, 1990 rehearing opinion. (Appendix at A 4 - A 5).

In virtually every Title VII decision in this Court the role of intent or motive and the acceptable manner of proving this element are at the heart of the controversy. This is equally true in Title VII at summary judgment where a plaintiff is required to come forward with evidence demonstrating that a material issue of fact exists for trial.[12] *Celotex Corp. v. Catrett, supra.* Without a clear articulation of the amount or nature of the evidence required from a plaintiff to resist summary judgment, Title VII cases will develop in a

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[12] The courts below recognized a dispute between Canitia and YFS's management official, Marino, on the statements of intent of the August 15, 1986 meeting. (Appendix at A 6). Notwithstanding this dispute on a material fact related to motivation summary judgment was not only granted, but ultimately affirmed by the circuit.

haphazard and inconsistent manner.

The *prima facie* case in the courts below was articulated with four (4) elements. (Appendix at A 4; See also: A 30 - A 31). The courts below readily conceded that plaintiff had established the first three (3) elements. The fourth element, "(4) that there was a causal connection between the protected activity and the adverse employment action," is more elusive and subject to varying interpretations.

Notable for its lack of attention from this Court are retaliation cases under Title VII, which present a different set of circumstances from the traditional Title VII syllogisms. Specifically, in a retaliation case an employer acts against a person who is

already known to have engaged in some protected act. Mindful of the need to protect victims of and witnesses to discrimination, Congress included the protections of Section 704(a) in Title VII. The protected activities under Section 704(a) fall within three broad categories, which are commonly referred to as: 1) opposition; 2) prior charge; or 3) participation. 42 U.S.C. Section 2000e-3(a)[full text *supra* at p. 4]. The instant retaliation case focuses on the participation aspects of retaliation. The formulation of a *prima facie* case of retaliation in the Sixth Circuit has grown out of controversies involving opposition and prior charge claims. *Jackson v. RKO Bottlers, Inc.*, 743 F.2d 370 (6th Cir. 1986); and *Wrenn v. Gould,*

Inc., 808 F.2d 493 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1032 (1988). The courts below not only adopted the same formulation, but applied it in a manner which gave Canitia a higher burden at summary judgment. Direct evidence of motive or intent is not required to establish opposition or charge based retaliation.

The only significant difference in the types of claims presented under Section 704(a) are that claims arising out of either filing a charge or direct opposition involve the conscious choice of the individual to pursue other substantive rights under Title VII. While a participation claim will on occasion address voluntary participation, most often a participant is a stranger to

the underlying dispute between an employer and an employee or applicant. The formulation adopted and followed by the courts below included burdens which are not properly part of the *prima facie* case requirements on a plaintiff. A subpoenaed witness testifying in a court proceeding should not be intimidated by having a burden of proof greater than that of any other Title VII litigant.

B. This Court Has Not Addressed the Non-Movant's Burden in an Employment Discrimination Case Where Motive or Intent Are in Issue in The Context of the "Summary Judgment Trilogy."

One of the touchstones of this Court's 1986 summary judgment trilogy is that a court considering a motion for summary judgment can put the burden of coming forward with the evidence on the

party who has the burden as the proponent at trial. Equally important is that the party seeking or resisting summary judgment must only meet the standard for granting or denying a "directed verdict." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986).

The lower courts have embarked upon a "new era" for summary judgment since the 1986 trilogy of *Anderson v. Liberty Lobby, Inc., supra, Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., supra,* and *Celotex Corp. v. Catrett, supra.* See: *Street v. J.C. Bradford Co.*, 886 F.2d 1472 (6th Cir. 1989). While there is no denying that there has been a resurgence in summary judgment practice following the trilogy, the substantive causes of action

addressed in the trilogy lack the kind of motivation or intent issues required as an element in retaliatory discharge cases under Title VII.

In *Anderson* the issue of intent or motive revolved around the 'actual malice' standard, which has evolved in public figure/interest defamation cases under *New York Times, Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964), and its progeny. While *Anderson* is relied upon heavily in *Street v. J.C. Bradford Co., supra,* for the proposition that even cases involving issues of intent are amenable to summary judgment, Canitia submits that this misses the mark.

In *Anderson* the 'actual malice' standard requires proof of intent on the level of a reckless disregard for the

truth, and is not dependent on the state of mind of the writer. The relative burdens in a retaliatory discharge case by a fact witness, who testified in a Title VII trial, require that the issue of motivation or intent be a more individualized inquiry into the state of mind of the individuals acting on the employer's behalf. The decisions below do not examine evidence supporting the indicia of intent in a manner consistent with the underlying purposes of Section 704(a). Furthermore, the decisions below run afoul of Rule 56. Notwithstanding the admonitions of *Celotex, supra,* the circuit recognized that this is close case. (Appendix at A 9). Close cases are not appropriate for summary judgment and are especially inappropriate where the

courts are to construe the evidence in light most favorable to the non-movant. *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460 (2d Cir. 1989).

The strong likelihood exists that the vitality of 704(a) will be eviscerated where the issue of motive and intent is determined without any opportunity to assess credibility. Prior decisions of this Court do not address the standards for evaluating evidence which places motivation and intent in issue at summary judgment in Title VII retaliation cases.

In an early Title VII retaliation case, *Grant v. Bethlehem Steel Corp.*, [16 EPD Para. 8261] (S.D.N.Y. 1977), *aff'd* 622 F.2d 43 (2d Cir. 1980), *cert. denied* 452 U.S. 940 (1981), the trial court

expressed a view on the motive or causal connection element on the merits, which would preclude summary judgment:

> Proof of the causal connection between protected activity and adverse consequence must of necessity be indirect for the simple reason that alleged retaliators can hardly be expected to confess to punishing plaintiffs for protected acts. Accordingly, courts have found a prima facie case of retaliation to be established when protected activity is followed by adverse treatment. [citations omitted]

16 EPD at p. 5360. At summary judgment there is no opportunity to assess the believability of the proffered reason for the adverse employment action. In the absence of guidance from this Court there will be consequences going to the heart of our system of justice. If disinterested witnesses are discharged

for giving testimony in federal courts the integrity of our judicial system is at peril.

II. The Decision of the Court Below Gives Unwarranted Deference to the Results of a Grievance Process Representing an Egregious Departure From *Alexander v. Gardner-Denver Co.*[13]

In *Alexander v. Gardner-Denver Co.*, *supra*, this Court determined that a plaintiff's claim of racial discrimination under Title VII was not barred by the submission of the same issue to final arbitration under a non-discrimination clause of a collective bargaining agreement. Reversing the lower courts grant of summary judgment this Court decided that plaintiff was entitled to a trial *de novo* on his Title

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[13] 415 U.S. 36, 94 S.Ct. 1011 (1968).

VII claims. In deciding the competing policy considerations between a collectively bargained procedure and Title VII the Court rejected a deferral rule to arbitrations. The *Alexander* Court, in a unanimous opinion, concluded:

> ... the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.[footnote 21 omitted].

415 U.S. at 59,60, 94 S.Ct. at 1025. This holding gives district courts wide discretion to determine admissibility and

weight on an arbitration decision on the same issues. 415 U.S. at 60, n. 21, 94 S.Ct. at 1025, n. 21. However, it does not sanction the wholesale adoption of an arbitrated decision as the Sixth Circuit suggests.

In an unprecedented extension of *Alexander* the courts below relied upon the unarbitrated committee dispositions of Canitia's grievances to bootstrap their summary judgment decisions. The dispositions of Canitia's grievances are without any record, testimony or consideration of the Title VII claims raised. It is just this type of incomplete record which justifies *Alexander's* limited use of and no deferral to arbitration awards, even where the arbitration is based upon a

discrimination claim. The deference given to the grievance dispositions by the courts below extends the *Alexander* rule beyond any limits contemplated by this Court.

III. The Failure of the Court Below to Apply the Proper Standard for Intent in Title VII Cases At Summary Judgment Misapplies The Standard as Decided by This Court.

The rehearing opinion reaffirms the circuit's adherence to the "but for" test for causation, ignoring this Court's recent decision in *Price Waterhouse v. Hopkins*, ___ U.S. ___, 109 S.Ct. 1775 (1989). This contrasts with the "significant factor" test originally relied upon by the panel, which resulted in a reversal of summary judgment. (Appendix at A 17 - A 23). This difference in description of the standard

to be used in evaluating the evidence at summary judgment in a Title VII case has created a need for this Court to give guidance and supervision to the lower courts on this important standard.

In *Price Waterhouse* this Court rejected a causation or motive standard of "but for" and described the burden of a plaintiff in a Title VII case to be "because of" not "solely because of." 109 S.Ct. at 1785. The standard enunciated in Justice Brennan's plurality opinion, tailored to the instant claim, is that in a Title VII case where plaintiff's participation played a motivating part in the decision to discharge, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not taken

plaintiff's participation into account. 109 S.Ct. at 1795.

Justice White concurred in the judgment in *Price Waterhouse* and described the burdens as follows:

> ... And here, as in *Mt. Healthy*, ... the Court now holds, Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for the petitioner's action. Rather, as Justice O'CONNOR states, her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action.

109 S.Ct. at 1795. (emphasis original). Justice O'Connor joined in the judgment of the Court and explained her views on causation, supporting the view that "because of" meant "but for" under Title VII. Justice O'Connor went on to articulate what she meant:

> Where an individual disparate treatment plaintiff

> has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer's discriminatory motivation 'caused' the employment decision.....

109 S.Ct. at 1798. (emphasis original). The circuit must have made a distinction between the "significant factor" and "but for" tests in a manner which is contrary to this Court's decision.

There is little difference between "substantial factor" as used by Justices White and O'Connor and the "significant factor" referred to in *Polk v. Yellow Freight System, Inc.*, 876 F.2d 527 (6th Cir. 1989). While the descriptive phrase

chosen for judging the intent standard in the court below does not alter the ultimate burden of proof at trial, the panel on rehearing turned its decision completely around. This Court in the exercise of its supervisory powers over the lower courts should review this case in light of the unwarranted interpretation of the intent standard at summary judgment.[14]

Canitia's dilemma arises where in a disparate treatment case the appropriate standard at summary judgment on intent is inconsistently applied. This Court should not ask litigants to leave their common sense at the doorstep when we

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[14] The opinion below is in conflict with the Ninth Circuit's intent standard at summary judgment as expressed in *Yartzoff v. Thomas*, 809 F.2d 1371 (9th Cir. 1987).

approach this statute and its appropriate standards.

This Court has described the burden of proof on a Title VII claimant in a variety of manners. In *Price Waterhouse*, in addition to the opinion by Justice Brennan, both Justices White and O'Connor concurring in the judgment use a causation standard which comports with the statements of the panel in their opinion. The language relied upon for the "but for" formulation in *Goostree v. State of Tennessee*, 796 F.2d 854 (6th Cir. 1986), from *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574 (1976), was specifically addressed in *Price Waterhouse*.

Canitia undertook to perform his duties as a citizen and testified in a

trial. Although he is willing and able to present his proof of retaliation pursuant to Title VII at trial on the merits, the courts below have deprived him of this opportunity and instead engrafted this heightened degree of proof on a cold record at summary judgment. This Court's opinion in *Price Waterhouse* appears to have failed to put the instant issue in a clear formulation for the lower courts to follow.

IV. There Are Strong Policy Reasons Present to Limit or Bar Summary Judgment in Title VII Retaliation Cases Involving Witnesses.

Our system of justice depends to a great extent on the willingness of citizens to perform their basic civic responsibilities without fear of economic reprisal. In the trials of civil rights

cases the success or failure of claims routinely depends upon the testimony of witnesses with no stake in the proceedings. The disinterested witness is able to present testimony untainted by partisan advocacy.

In the *Few v. Yellow Freight Systems, Inc., supra,* trial and appeal the corroboration and confirmation of critical facts came from witness such as Canitia.[15] The potential for abuse of current employee witnesses by the employer has been recognized repeatedly in the employment context under both the

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[15] While the court below seems to require a pattern of retaliation there is evidence of record that supports a finding that three (3) of the four (4) non-management current employee witnesses of YFS who were subpoenaed for trial were terminated, one (1) was reinstated during the grievance process and retired shortly thereafter.

National Labor Relations Act[16] and the Fair Labor Standards Act[17], where the Courts have granted significant protections.[18] These protections for participation in vindicating strong national policies are equally present in Title VII participation cases.

It is very difficult for persons to get involved in events that they view as none of their business. It is even more deleterious on the search for justice in a federal court to have actual and potential witnesses decide that keeping

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[16] 29 U.S.C. Section 151, *et seq.*

[17] 29 U.S.C. Section 201, *et seq.*

[18] NLRA: "...when the employer either engages in surveillance or takes steps leading his employees to think it is going on, they are under the threat of economic coercion." *Filler Prod., Inc. v. NLRB,* 376 F.2d 369 (4th Cir. 1967); FLSA: *Wirtz v. Home News Publishing Co.,* 341 F.2d 20 (5th Cir. 1965).

their immediate job takes precedence over testifying fully and truthfully in a trial. We cannot in a society of laws allow our constitutional system of dispute resolution and the national priority given to effectuating civil rights guarantees to return to the survival of the fittest.

This Court, and the thousands of Americans who turn to the federal courts with civil rights claims each year, depends on the system to work fairly and honestly. It may just be appropriate to bar summary judgment in Title VII retaliation cases based upon participation to insure that trials on the merits will carefully examine all the facts and circumstances surrounding the issues of motive and intent presented.

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the Sixth Circuit and to give guidance to the lower courts on the standards to be used in granting of summary judgment in retaliation cases where motivation and intent are in issue. In addition the supervision of the lower courts is essential for the securing of

the strong national priority given to the eradication of unlawful employment discrimination.

Respectfully submitted,

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October, 1990

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RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 89-3119

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THOMAS O. CANITIA,
Plaintiff-Appellant,
v.
YELLOW FREIGHT SYSTEM, INC.,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed May 22, 1990

Before: WELLFORD and NELSON, Circuit Judges; and SUHRHEINRICH,* District Judge.

The court delivered a PER CURIAM opinion. NELSON, Circuit Judge, (p. 10) delivered a separate concurring opinion.

PER CURIAM. The opinion filed in this cause January 23, 1990, and reported at 894 F.2d 196, is withdrawn following reconsideration in response to defendant Yellow Freight System, Inc.'s (YFS') petition for rehearing. We have reviewed our decision carefully in light of the petition for

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*The Honorable Richard F. Suhrheinrich, United States District Judge for the Eastern District of Michigan, sitting by designation.

rehearing, the response of plaintiff, and the record in this cause. This careful review of the record before us establishes that we relied on erroneous factual information, and may have used unnecessarily confusing language in describing the applicable legal burdens in a Title VII case.

Plaintiff Thomas Canitia sued his former employer, YFS, alleging retaliatory discharge resulting from Canitia's testimony in the case of a fellow worker who successfully sued YFS for race and sex discrimination. Following discovery, the district court granted defendant YFS' motion for summary judgment, and Canitia appealed.

Canitia had been a truck driver for YFS for some 13 years at the time of his termination in December, 1986. In January of that year, Canitia appeared as a witness for the plaintiff in a case entitled *Few v. Yellow Freight System, Inc.*, No. C85-2478A (N.D. Ohio). A decision in favor of Few came forth on April 24, 1986.

In the three months between giving his testimony and the delivery of judgment in *Few*, Canitia received one disciplinary letter. Following judgment in the *Few* case, he received six disciplinary letters in two months, and was subjected to a suspension. Plaintiff relies substantially on these facts as strong circumstantial evidence of retaliation.

The contractual grievance procedures allow an employee such as Canitia to present his case to a series of committees made up of equal numbers of management and union representatives. A majority of these representatives at any stage may reverse or modify disciplinary measures directed against the employee. If the final committee in the grievance process (the "Central States Committee") deadlocks on the issue of discipline, the matter is then referred to arbitration.

Upon returning to work following his August 1986 suspension, Canitia was called to meet with YFS management representatives Nick Marino and Joe Alder. Canitia maintains that

his testimony in the *Few* case was brought up by management, an allegation which both Marino and Adler deny. They claim, rather, that their efforts to discuss Canitia's unsatisfactory on-the-job performance ended when Canitia swore at them and walked out of the meeting.

Later that month, YFS management placed Canitia under surveillance, using management members as well as an outside "spotting" firm, to discover instances in which plaintiff assertedly was "unreasonably abusing" company time. This occurred while Canitia was on "overtime" status. Manager Marino decided to seek to terminate Canitia as a consequence.

Following grievance proceedings, Canitia's termination was converted to a suspension without pay or benefits. Upon his return to work, Canitia was once again placed under surveillance by YFS management, whose investigation resulted in allegations that Canitia was still engaging in the same type of delay and misconduct in the carrying out of his driver-delivery duties. On December 26, 1986, Canitia was discharged, and this discharge was upheld by the grievance committee.

Following an initial dismissal, appeal, and remand, this cased moved into its discovery phase in February 1988. Thereafter, YFS moved for summary judgment. After the time for responding to this motion had elapsed, Canitia moved for an extension of time to respond. This motion of Canitia was denied, and the district court granted summary judgment for defendant YFS. Canitia's subsequent motion to alter or amend this judgment was granted by the district court in January, 1989, and Canitia was then given an opportunity to respond to YFS' motion for summary judgment. After considering this response, the district court then reaffirmed its earlier grant of summary judgment.

The district court found that plaintiff failed to establish a prima facie case of retaliatory discharge. Furthermore, the

court found that even if Canitia could be deemed to make out a prima facie case, YFS had come forward with a non-retaliatory, legitimate basis for the termination. The district court concluded that "in order to raise a genuine issue of material fact plaintiff must produce evidence showing that the reason given is a mere pretext. There is no such evidence before this Court."

In order to establish a case of retaliatory discharge, plaintiff must prove (1) that he engaged in an activity protected by Title VII; (2) that this exercise of his protected civil rights was known to defendant; (3) that defendant thereafter took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982).

If and when plaintiff has established a prima facie case, the burden of production of evidence shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Wrenn*, 808 F.2d at 501. The plaintiff, who bears the burden of persuasion throughout the entire process, then must demonstrate "that the proffered reason was not the true reason for the employment decision." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

The district court found that Canitia had established the first three elements of his claim, but had failed to establish the causal connection between his testimony in *Few* and his termination:

> [T]here is no direct evidence showing that defendant's actions against plaintiff were motivated by a desire to retaliate for testimony given by plaintiff in the civil suit. Nor are there any inferences to be drawn which support such a finding. Simply, plaintiff has failed to establish that defendant had a retal-

> iatory motive. Thus, there is no genuine issue of any material fact and . . . defendant is entitled to judgment as a matter of law.

Furthermore, the court found that even if plaintiff had made out a prima facie case, YFS had established a legitimate and non-discriminatory reason for the termination:

> The plaintiff's deficient job performance, as evidenced by the continued string of written warnings, provides a legitimate reason for the first hearing. This conclusion is supported by the fact that the State Grievance Committee upheld the suspension. . . . Affirmance [of the later discharge] by the State Grievance Committee and the previous work performance problems of plaintiff demonstrate that the discharge was for a legitimate reason.

A Title VII case "begins with the plaintiff's duty to establish a prima facie case by showing such facts as give rise to an inference of unlawful discrimination. That is a burden easily met." *Wrenn*, 808 F.2d at 500. We must examine the timing of events, Canitia's participation in co-employee Few's discrimination claim, and Canitia's frequent disciplinary problems to determine whether he has established a prima facie case through the use of circumstantial evidence or otherwise.

It appears that Canitia received at least twelve warning letters in the three years *prior* to his Few testimony in early 1986 (in addition to warning letters that were subsequently retracted and oral warnings) with respect to his duties as a city pick-up and delivery driver. Plaintiff was one of a number of witnesses who testified for Few in his claim against YFS, and there is no record of any pattern of retaliation against such witnesses generally by YFS. During the nine months preceding July, 1986, it appears that Canitia received six warning letters, including one concerning his alleged low productivity, which YFS characterized as "abuse of company

time."[1] A one-day disciplinary suspension was given him in a July 2, 1986 terminal hearing which plaintiff grieved. This suspension was ultimately upheld and YFS attempted to counsel plaintiff concerning this productivity problem.

Still later in 1986 YFS, after surveillance of plaintiff's activities on the job, discharged Canitia, who again followed the grievance process challenging the action as retaliatory. The discharge was reduced to a ten-day suspension without pay. After returning to work, again in late 1986, YFS surveilled plaintiff to determine whether his productivity had reached an acceptable level. Allegedly, an even longer delay occurred while Canitia was making a delivery at Euclid Industries. Notice was again given Canitia, who appeared for a hearing on December 26, 1986, and was once again discharged by YFS. Canitia again filed a grievance. This time the discharge was sustained at the end of the grievance procedure.

Assuming that Mr. Marino alluded to plaintiff's testimony in the *Few* case, despite his denial, is this enough, in light of the history of displinary actions taken against Canitia, to constitute a genuine issue of material fact with regard to the charge of retaliation? Canitia states in his brief that his own testimony was cited by this court in *Few v. Yellow Freight Systems*, 845 F.2d 123 (6th Cir. 1988), as a basis for affirming a judgment for Few, a black female employee who claimed discrimination in her discharge. Canitia's name is mentioned, 845 F.2d at 124, citing from a portion of the district court findings as one of the YFS employees who in 1983 com-

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[1]Canitia concedes that there were six warnings during an approximate ten-week period in 1986 prior to July. Canitia also concedes that he was warned in July of 1986 that the next such offense would bring about termination. (See appellant's brief at p. 9). Both 1986 disciplinary hearings (prior to the December action in controversy) occurred before Canitia filed a charge of retaliation with the EEOC, which preceded the December discharge in question.

plained about "unfair discipline on certain individuals." His other argument is that there are no specific production standards at YFS, and that subjective judgment is a basis for discipline in this respect.

The fact remains that Canitia had been terminated previously and twice recently disciplined (despite grieving each YFS action) for actions similar to those involved in the discharge at issue. This is a strong factor to take into account in considering the issues here. Summary judgment may be appropriate in Title VII cases even where certain facts may be in dispute. *Shah v. General Electric Co.*, 816 F.2d 264 (6th Cir. 1987); *Boddy v. Dean*, 821 F.2d 346 (6th Cir. 1987).

In contrast to the facts as described in our previous opinion, 894 F.2d at 197, a careful examination of the record reveals that Canitia received seven warning letters to his file in 1984, plus at least three in 1985, so that what occurred in 1986 after his testimony in the *Few* case does not reflect a sudden surge of disciplinary actions. We find the situtation here to be comparable to the facts in *Cooper v. City of North Olmsted*, 795 F.2d 1265 (6th Cir. 1986).

In *Cooper*, a Title VII plaintiff claimed that she was discharged in retaliation for bringing a complaint before a state civil rights commission. The plaintiff had been cited for rules violations six times in the seven-month period preceding the state complaint, and nine times in the four months following the complaint. The court found: "While a disparity in the amount of disciplinary action may certainly be sufficient in appropriate cases to support an inference of retaliation, this is not such a case." 795 F.2d at 1272.

Here, as in *Cooper*, we are not examining the case of a trouble-free employee during the months and years before the incident which he alleges gave rise to a retaliatory motive and subsequent and sudden job warnings by the employer. In the case at issue three disciplines instituted against Canitia

were vindicated to some degree after full grievance procedure review.

Even assuming that Canitia established a prima facie case of retaliatory treatment, YFS did supply ample evidence to meet its burden of establishing a legitimate reason for its treatment of Canitia. Canitia's further burden, then, was "to produce direct, indirect or circumstantial evidence" that his treatment was the result of retaliatory motive. *Gagne v. Northwestern National Insurance Co.*, 881 F.2d 309, 314 (6th Cir. 1989).

> It is clear that merely making out a prima facie case does not automatically save appellant from a summary judgment motion. Indeed, the inference of discrimination created by the prima facie case is dispelled once the employer's reason is stated, until and unless the latter is shown to be a pretext.

Gagne, 881 F.2d at 314 (internal quotation marks and citations omitted).

A plaintiff in this type of case must be establish that the decision complained about as retaliatory would not have been made "but for" the protected status of the plaintiff. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988); *Batts v. NLT Corp.*, 844 F.2d 331, 335 (6th Cir. 1988). *See also* a case involving this defendant, *Polk v. Yellow Freight Systems, Inc.*, 801 F.2d 190, 199 (6th Cir. 1986); *Goostree v. State of Tennessee*, 796 F.2d 854, 863 (6th Cir. 1986) *cert. denied*, 480 U.S. 918 (1987); and *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985). In view of the entire record at the time the district court made its decision on the summary judgment motion, we can find no error in the district court's conclusion that Canitia has not met this standard. The evidence, and any reasonable inference to be drawn therefrom, relied upon by plaintiff is insufficiently probative to overcome defendant's substantial proof in support of summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242

(1986); *Street v. J. C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989).

This is a close case and we have previously given plaintiff a substantial benefit of considerable doubt in initially directing a remand for further consideration. Upon further reflection in view of defendant's thoughtful petition for rehearing, we now **AFFIRM** the action of the district court.

DAVID A. NELSON, Circuit Judge, concurring. I write separately to note my understanding that if Mr. Canitia had been able to show that there was a genuine issue as to whether his testimony in the *Few* case was a "substantial" or "motivating" factor in his discharge, the entry of summary judgment against him would have been inappropriate unless the record also showed that there was no genuine issue as to the fact, asserted by the employer, that Mr. Canitia would have been discharged anyway. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); Rule 56, Fed. R. Civ. P.; *cf. Price Waterhouse v. Hopkins*, 490 U.S. _, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Although I initially thought that the state of the record was such as to bar summary judgment on whether the *Few* testimony was a substantial factor in the discharge, the analysis set forth in the instant opinion persuades me that if the case went to trial, there is no way Mr. Canitia could carry his burden of proof on that issue. Given the demands now being made on the time of most district courts, it seems to me that a full-scale trial in a case as lopsided as this one would probably be a misallocation of judicial resources.

No. 89-3119
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS O. CANITIA,	)	FILED
	)	JUL 10 1990
Plaintiff-Appellant,	)	
	)	
v.	)	O R D E R
	)	
YELLOW FREIGHT SYSTEM, INC.,	)	
	)	
Defendant-Appellee	)	
	)	

BEFORE: WELLFORD and NELSON, Circuit Judges; and SUHRHEINRICH*, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been

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* Hon. Richard F. Suhrheinrich sitting by designation from the Eastern District of Michigan

referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 89-3119

THOMAS O. CANITIA,

Plaintiff-Appellant,

v.

YELLOW FREIGHT SYSTEM, INC.,

Defendant-Appellee.

Before: WELLFORD and NELSON, Circuit Judges; and SUHRHEINRICH, District Judge

J U D G M E N T

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

A TRUE COPY
Attest:

By /s/ Deputy Clerk

Issued as Mandate: July 18, 1990

Costs: (Awarded to appellant)

Filing fee.....	$ 105.00
Printing.....	$ 1,548.75
Total.....	$ 1,653.75

UNITED STATES COURT OF APPEALS

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NO. 89-3119

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ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

A TRUE COPY
Attest:

By /s/ Deputy Clerk

Issued as Mandate: July 20, 1990

Costs: None

Filing fee.....$
Printing.....$

Total.....$

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 89-3119

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THOMAS O. CANITIA,
Plaintiff-Appellant,
v.
YELLOW FREIGHT SYSTEM, INC.,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed January 23, 1990

Before: WELLFORD and NELSON, Circuit Judges; and SUHRHEINRICH,* District Judge.

PER CURIAM. Plaintiff Thomas Canitia sued his former employer, Yellow Freight System (YFS), alleging retaliatory discharge resulting from Canitia's testimony in the case of a fellow worker who successfully sued YFS for race and sex discrimination. Following discovery, the district court granted defendant YFS' motion for summary judgment and Canitia appeals.

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*The Honorable Richard F. Suhrheinrich, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

Canitia had been a truck driver for YFS for some 13 years at the time of his termination in December, 1986. In January of that year, Canitia appeared as a witness for the plaintiff in a case entitled *Few v. Yellow Freight System, Inc.*, No. C85-2478A (N.D. Ohio). A decision in favor of Few came forth on April 24, 1986.

In the years prior to Canitia's involvement in the *Few* case, he received eight disciplinary letters to his file, and had been suspended once for his involvement in an accident. In the three months between giving his testimony and the delivery of judgment in *Few*, Canitia received one disciplinary letter. Following judgment in the *Few* case, he received six disciplinary letters in two months, and was subjected to a suspension. Plaintiff relies substantially on these facts as strong circumstantial evidence of retaliation.

The contractual grievance procedures allow an employee such as Canitia to present his case to a series of committees made up of equal numbers of management and union representatives. A majority of these representatives at any stage may reverse or modify disciplinary measures directed against the employee. If the final committee in the grievance process (the "Central States Committee") deadlocks on the issue of discipline, the matter is then referred to arbitration.

Upon returning to work following his August 1986 suspension, Canitia was called to meet with YFS management representatives Nick Marino and Joe Alder. Canitia maintains that his testimony in the *Few* case was brought up by management, an allegation which both Marino and Alder deny. They claim, rather, that their efforts to discuss Canitia's unsatisfactory on-the-job performance ended when Canitia swore at them and walked out of the meeting.

Later that month, YFS management placed Canitia under surveillance, using management members as well as an outside "spotting" firm, to discover instances in which plaintiff assertedly was "unreasonably abusing" company time. This

occurred while Canitia was on "overtime" status. Manager Marino decided to seek to terminate Canitia as a consequence.

Following grievance proceedings undertaken as a consequence, Canitia's termination was converted to a suspension without pay or benefits. Upon his return to work, Canitia was once again placed under surveillance by YFS management, whose investigation resulted in allegations that Canitia was still engaging in the same type of delay and misconduct. On December 26, 1986, Canitia was discharged, and this discharge was upheld by the grievance committee.

Following an initial dismissal, appeal, and remand, this case moved into its discovery phase in February, 1988. Thereafter, YFS moved for summary judgment. After the time for responding to this motion had elapsed, Canitia moved for an extension of time to respond. This motion of Canitia was denied, and the district court granted summary judgment for defendant YFS. Canitia's subsequent motion to alter or amend this judgment was granted by the district court in January, 1989, and Canitia was then given an opportunity to respond to YFS' motion for summary judgment. After considering this response, the district court then reaffirmed its earlier grant of summary judgment.

The district court found that plaintiff failed to establish a prima facie case of retaliatory discharge. Furthermore, the court found that even if Canitia could be deemed to make out a prima facie case, YFS had come forward with a non-retaliatory, legitimate basis for the termination. The district court concluded that "in order to raise a genuine issue of material fact plaintiff must produce evidence showing that the reason given is a mere pretext. There is no such evidence before this Court."

In order to establish a case of retaliatory discharge, plaintiff must prove (1) that he engaged in an activity protected by Title VII; (2) that this exercise of his proper protected civil

rights was known to defendant; (3) that defendant thereafter took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1032 (1988); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982).

If and when plaintiff has established a prima facie case, the burden of production of evidence shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Wrenn*, 808 F.2d at 501. The plaintiff, who bears the burden of persuasion throughout the entire process, then must demonstrate "that the proffered reason was not the true reason for the employment decision." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

The district court found that Canitia had established the first three elements of his claim, but had failed to establish the causal connection between his testimony in *Few* and his termination:

> [T]here is no direct evidence showing that defendant's actions against plaintiff were motivated by a desire to retaliate for testimony given by plaintiff in the civil suit. Nor are there any inferences to be drawn which support such a finding. Simply, plaintiff has failed to establish that defendant had a retaliatory motive. Thus, there is no genuine issue of any material fact and . . . defendant is entitled to judgment as a matter of law.

Furthermore, the court found that even if plaintiff had made out a prima facie case, YFS had established a legitimate and non-discriminatory reason for the termination:

> The plaintiff's deficient job performance, as evidenced by the continued string of written warnings,

> provides a legitimate reason for the first hearing. This conclusion is supported by the fact that the State Grievance Committee upheld the suspension. . . . Affirmance [of the later discharge] by the State Grievance Committee and the previous work performance problems of plaintiff demonstrate that the discharge was for a legitimate reason.

A Title VII case "begins with the plaintiff's duty to establish a prima facie case by showing such facts as give rise to an inference of unlawful discrimination. That is a burden easily met." *Wrenn*, 808 F.2d at 500. Given the timing of events, Canitia's participation in the *Few* trial and his subsequent, frequent disciplinary problems, the trial court should consider whether Canitia had arguably established a prima facie case by circumstantial evidence.

YFS did supply ample evidence to meet its burden of establishing a legitimate reason for its treatment of Canitia. Canitia's further burden, then, was "to produce direct, indirect or circumstantial evidence" that his treatment, in substantial part, was the result of retaliatory motive. *Gagne v. Northwestern National Insurance Co.*, 881 F.2d 309, 314 (6th Cir. 1989).

> It is clear that merely making out a prima facie case does not automatically save appellant from a summary judgment motion. Indeed, the inference of discrimination created by the prima facie case is dispelled once the employer's reason is stated, until and unless the latter is shown to be a pretext.

Gagne, 881 F.2d at 314 (internal quotation marks and citations omitted).

"The plaintiff bears the burden of proving that the protected activity was a 'significant factor' in the decision to discharge." *Polk v. Yellow Freight System, Inc.*, 876 F.2d 527, 531 (6th Cir. 1989) ("[t]o be a 'significant factor,' it must be

one of the *reasons* for the discharge; the plaintiff need not prove that the discharge would not have occurred absent the protected activity"), citing *Taylor v. General Motors Corp.*, 826 F.2d 452, 456 (6th Cir. 1987) (emphasis added). While Canitia has provided little by way of direct evidence of retaliatory motive other than the inference raised by the timing of the discharge, there is the contested discussion about his testimony for Few after the trial. Specifically, Canitia alleges that Marino raised the issue of his testimony; YFS notes that Canitia's affidavit says only that Marino "alluded" to the testimony, and that Canitia's deposition does not assert that Marino made a direct reference to the testimony. YFS points out, moreover, that there is "no record evidence" to suggest that other witnesses on behalf of Few have alleged any discrimination or retaliation.

While the issue is close in this case, since every reasonable and favorable inference should be given to Canitia's version or allegations concerning the issue of intent to retaliate and its effect on a termination rather than some lesser penalty, we incline toward the view that there is a genuine issue of material fact which precludes the grant of summary judgment.

Our decision in this respect is buttressed by Canitia's claim of comparative evidence (driver manifests indicating a lack of YFS objective standards, and comparative data suggesting that Canitia did not indeed "abuse" company time, at least in reference to the alleged conduct of other drivers.) The district court did not discuss this evidence in its memorandum opinion, nor did it consider that the timing of a number of disciplinary notices after Canitia had testified had any significance. Instead, the district court held that there were no inferences to be drawn that defendant's actions against plaintiff were motivated by a desire to retaliate. Direct evidence of retaliation is difficult to come by in this type of case. *See Polk v. Yellow Freight System, supra.* The adverse decision in the grievance process is a factor to be taken into account against

Canitia, but it is not determinative. *Jasamy v. United States Postal Service,* 755 F.2d 1244 (6th Cir. 1985).

We are concerned, in sum, that the district court may have weighed the evidence, made credibility determinations, or over-emphasized the effect of the grievance decision in awarding summary judgment. There appears to be an issue of material and significant controversy about an alleged inquiry into Canitia's testimony in *Few* that precludes summary judgment. The time span involved with respect to disciplinary actions with respect to the protected action does not preclude the drawing of an inference of retaliation as argued by defendant.

We, accordingly, **REVERSE** and **REMAND** for further proceedings consistent with this decision.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
88 OCT 31

THOMAS O. CANITIA Plaintiff -vs- YELLOW FREIGHT SYSTEM, INC. Defendant	JUDGE ALVIN I. KRENZLER CASE NO.C87-340A

MEMORANDUM OF OPINION RE: GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court upon defendant, Yellow Freight System, Incorporated's, motion for summary judgment. Plaintiff, Thomas O. Canitia, initiated this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000e, et seq., alleging retaliatory discharge by defendant. Plaintiff has not responded

to defendant's motion for summary judgment. For the following reasons, defendant's motion shall be granted.

This Court's consideration of defendant's motion is govered [sic] by the provisions of Rule 56 of the Federal Rules of Civil Procedure. Rule 56 states in part:

> (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> (e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue

> for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

Accordingly, the evidence must be viewed in the light most favorable to plaintiff. In so doing, this Court must disregard plaintiff's pleadings and look only to those facts established by defendant's evidence. Only in the event that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law may summary judgment be granted.

The undisputed facts before this Court are as follows.[1] Plaintiff was

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[1] The evidence presented by defendant which establishes these facts are the depositions of plaintiff and Nick Marino (Defendant's Cleveland breakbulk terminal manager), and the affidavits of Nick Marino and George Knox (the owner of Truck Watch of Ohio). In addition, plaintiff's deposition includes various exhibits.

employed by defendant from on or about May 8, 1973, through December 26, 1986. Plaintiff was represented by a union under a collective bargaining agreement. In accordance with that agreement and between June 30, 1983, and August 14, 1985, plaintiff received twelve written warnings for various deficiencies in his work performance including abuse of company time, failure to report in, failure to follow instructions, insubordination, failure to secure load and participation in a preventable accident,[1] Plaintiff filed objections to eleven of these written warnings but none were retracted.

On January 29, 1986, plaintiff testified at trial in a suit brought by a

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[1] See Plaintiff's Deposition Exhibits N, O, P, R, S, T, U, W, X, AA, BB, and DD.

third party against defendant. This is the protected activity for which plaintiff claims he was retaliated against.

After plaintiff testified, he received more written warnings. The first was dated April 17, 1986. During the next two months, plaintiff received six more written warnings.[3] These warnings chastised plaintiff for failure to check freight, abusive language to a supervisor and abuse of company time. Plaintiff filed objections with the union as to six of these seven post-testimony written warnings. One warning was subsequently retracted.

On July 2, 1986, defendant conducted a hearing to discuss plaintiff's overall

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[3] See Plaintiff's Deposition Exhibits HH, II, JJ, LL, MM and NN.

work record. Pursuant to the collective bargaining agreement, defendant could only consider, in this hearing, written warnings issued within the previous nine months. There were six such warnings within that time period. At this hearing, defendant decided to suspend plaintiff for one day. Plaintiff filed a grievance challenging the suspension, but the suspension was upheld by the State Grievance Committee. After the suspension, plaintiff was put under surveillance for two days and ultimately received five more written warnings, one of which was later retracted, before a second hearing was conducted on November 4, 1986.[1] At this hearing, defendant decided to discharge plaintiff. Once

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[1] See Plaintiff's Deposition Exhibits KK, QQ, SS, VV, WW and XX.

again plaintiff filed a grievance. This time the State Grievance Committee overturned plaintiff's discharge, but suspended plaintiff until December 1, 1986.

After plaintiff returned to work, defendant put him under surveillance again. Having determined that plaintiff's work habits had not improved, defendant conducted a third hearing on December 21, 1986. At this hearing, defendant decided to discharge plaintiff. Plaintiff filed a grievance, but this time the State Grievance Committee upheld his discharge.

In order to establish a prima facie case of retaliatory discharge, plaintiff must show that: (1) he engaged in a protected activity; (2) defendant knew of this activity; (3) there was subsequent

adverse employment action taken against him by defendant; and (4) retaliation for the protected activity was the motivation behind the adverse employment action. See Wrenn v. Gould, 808 F.2d 493 (6th Cir. 1987), cert. denied, 108 S. Ct. 1032 (1988). Nonetheless, even where plaintiff makes out a prima facie case, if defendant can establish some legitimate reason for the adverse employment action, then the burden rests upon the plaintiff to show that the otherwise legitimate reason is a mere pretext. Id. at 501.

In the case at bar, plaintiff has established the first three elements of a prima facie case. Plaintiff gave testimony in a court of law which is clearly a protected activity. Equally clear is that defendant knew of the

activity and that adverse employment action, disciplinary hearings and finally discharge, resulted after he testified. However, there is no direct evidence showing that defendant's actions against plaintiff were motivated by a desire to retaliate for testimony given by plaintiff in the civil suit. Nor are there any inferences to be drawn which support such a finding. Simply, plaintiff has failed to establish that defendant had a retaliatory motive. Thus, there is no genuine issue of any material fact and, since plaintiff has failed to establish a prima facie case, defendant is entitled to judgment as a matter of law.

However, even if this Court were to conclude that plaintiff has established a prima facie case, defendant has

established a legitimate reason for the hearings, suspensions and discharge. Thus, it is incumbent upon plaintiff to demonstrate that the reason given by defendant is a mere pretext.

As to defendant's legitimate reason, plaintiff received a written warning nearly three months after his testimony. The warnings continued until plaintiff had accumulated six post-testimony written warnings and then defendant took action by conducting its first hearing concerning plaintiff's work performance. The plaintiff's deficient job performance, as evidenced by the continued string of written warnings, provides a legitimate reason for the first hearing. This conclusion is supported by the fact that the State Grievance Committee upheld the

suspension. The surveillance and close scrutiny of plaintiff's performance thereafter was proper in order to ensure that plaintiff's deficient work performance improved. When it did not, defendant held its second hearing. Although his discharge resulting from this hearing was ultimately overruled by the State Grievance Committee, the Committee's imposition of a suspension in lieu of discharge shows that plaintiff's work performance remained deficient. Again, the post-suspension surveillance was justified to ensure improved work performance. When there was no improvement, defendant brought the third hearing and discharged plaintiff. Affirmance by the State Grievance Committee and the previous work performance problems of plaintiff

demonstrate that the discharge was for a legitimate reason.

Having determined that defendant had a legitimate reason for the adverse employment action taken against plaintiff, in order to raise a genuine issue of material fact plaintiff must produce evidence showing that the reason given is a mere pretext. There is no such evidence before this Court. Therefore, there is no issue of fact as to whether defendant had a legitimate reason for the adverse employment action taken against plaintiff and, even if plaintiff had established a prima facie case, defendant would be entitled to judgment as a matter of law.

In light of the foregoing, defendant's motion for summary judgment shall be granted and judgment shall be

entered for defendant and against plaintiff.

/s/ Alvin I. Krenzler
United States District Judge

Bruce Elfvin
Edward Kaminski

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
88 OCT 31

THOMAS O. CANITIA Plaintiff -vs- YELLOW FREIGHT SYSTEM, INC. Defendant	) JUDGE ALVIN I. KRENZLER)) CASE NO.C87-340A

JUDGMENT ENTRY

This Court, having separately filed its Memorandum of Opinion Re: Granting Defendant's Motion for Summary Judgment, enters judgment for defendant and against plaintiff. Plaintiff to pay costs.

IT IS SO ORDERED.

\s\ Alvin I. Krenzler
United States District Judge

Bruce Elfvin
Edward Kaminski

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
89 JAN -4

THOMAS O. CANITIA Plaintiff -vs- YELLOW FREIGHT SYSTEM, INC. Defendant	JUDGE ALVIN I. KRENZLER CASE NO.C87-340A

ORDER GRANTING PLAINTIFF'S MOTION TO VACATE JUDGMENT

This Court previously granted defendant, Yellow Freight System, Inc.'s, unopposed motion for summary judgment and entered judgment for defendant and against plaintiff, Thomas O. Canitia. Pending before this Court is plaintiff's motion to alter and amend or vacate that judgment. The basis of plaintiff's motion is that he was denied an adequate

opportunity to respond to defendant's motion for summary judgment.

Attached to plaintiff's motion is a "Memorandum in Support of Plaintiff's Motion to Alter and Amend or Vacate Judgment of October 31, 1988." In addition, plaintiff has filed the depositions of David Elson, Judy Batton, Joe Alder, and Nicholas Marino, and various other evidentiary materials in support of his underlying claim. In his memorandum, plaintiff argues that there exist issues of material fact with respect to his underlying claim. Thus, despite the title given to plaintiff's memorandum, this Court construes it to be a memorandum in opposition to defendant's motion for summary judgment.

Upon full consideration, this Court hereby grants plaintiff's motion, and

vacates its previous judgment entered for defendant, and against plaintiff. This Court shall reconsider defendant's motion in light of plaintiff's opposing memorandum and evidentiary submissions.

IT IS SO ORDERED.

/s/ Alvin I. Krenzler
United States District Judge

Bruce Elfvin
James Kurek

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
89 JAN -4

THOMAS O. CANITIA Plaintiff -vs- YELLOW FREIGHT SYSTEM, INC. Defendant	JUDGE ALVIN I. KRENZLER CASE NO.C87-340A

MEMORANDUM OF OPINION RE: GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON RECONSIDERATION

Pending before this Court is defendant's motion for summary judgment. This Court previously granted defendant's motion and entered judgment for defendant, and against plaintiff. Subsequently, plaintiff filed a motion to alter and amend or vacate that judgment. This Court granted plaintiff's motion and

vacated its judgment for defendant.

Attached to plaintiff's motion to alter and amend or vacate, was a memorandum in support, including evidentiary submissions, which this Court found to be substantively a memorandum in opposition to defendant's motion for summary judgment. In this memorandum, plaintiff argues that there exist genuine issues of material fact as to his claim of retaliatory discharge against defendant and, therefore, defendant's motion for summary judgment should be denied.

This Court has fully reviewed and considered all materials submitted by both parties and affirms its previous findings. This Court finds, for the reasons stated in its previous Memorandum of Opinion Re: Granting Defendant's

Motion for Summary Judgment, that there is no genuine issue of material fact and that defendant is entitled to judgment as a matter of law. Defendant's motion for summary judgment shall therefore be granted, and judgment shall be entered for defendant, and against plaintiff.

/s/ Alvin I. Krenzler
United States District Judge

James Kurek
Bruce Elfvin

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS O. CANITIA Plaintiff -vs- YELLOW FREIGHT SYSTEM, INC. Defendant	JUDGE ALVIN I. KRENZLER CASE NO.C87-340A

JUDGMENT ENTRY

This Court, having separately filed its Memorandum of Opinion Re: Granting Defendant's Motion for Summary Judgment on Reconsideration, hereby grants defendant's motion for summary judgment, and enters judgment for defendant and against plaintiff. Plaintiff to pay costs.

IT IS SO ORDERED.

/s/ Alvin I. Krenzler
United States District Judge

James Kurek
Bruce Elfvin

No. 90-596

IN THE

Supreme Court of the United States

October Term, 1990

THOMAS O. CANITIA,
Petitioner,

vs.

YELLOW FREIGHT SYSTEM, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Although Petitioner sets forth three separate questions presented for review, in fact, the one fundamental question being presented for review may be stated as follows: Whether summary judgment was properly entered in favor of Defendant on Plaintiff's Title VII retaliation claim based on Plaintiff's failure to produce any evidence of unlawful retaliation?

PARTIES INVOLVED

Yellow Freight System, Inc. has no parent company or subsidiaries as contemplated in Rule 29.1.

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No. 90-596

IN THE

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In his Petition for Writ of Certiorari submitted to this Court, Petitioner sets forth a Statement of the Case which contains numerous factual errors.[1] Without any citation to the location in the record below where such facts purportedly are established, Petitioner misstates

[1] *See,* Petition for Writ of Certiorari, at pp. 4-14; hereinafter "Pet. _____."

numerous facts and relies on alleged facts which are not supported by the unrebutted evidence presented to the District Court or are new matters which were never raised before the District Court. For these reasons, Respondent, Yellow Feight System, Inc.[2] must set forth its own statement of the case.

Petitioner intimates that he did not begin to receive a significant number of warning letters until after the District Court's decision in the *Few* case (Pet. 5). However, the unrebutted evidence presented to the District Court demonstrated that Petitioner had received a significant number of warning letters for various types of performance deficiencies on many occasions prior to his testimony in that case.[3] Indeed, the Court of Appeals gave appropriate consideration to that unrebutted fact in its opinion (Pet. A7). Thus, although Petitioner attempts to claim that he had a virtually unblemished record prior to his testimony, that assertion is not supported by the record in this case.

Petitioner attempts to use a limitation contained in the applicable collective bargaining agreement regarding the period of time for which discipline can be considered, as a vehicle for limiting the lower courts' consideration of the prior discipline which he had in fact received (Pet. 6). However, the existence of such a limitation in the collective bargaining agreement does not change the unrebutted fact that Petitioner had received a substantial number of warning letters prior to his testimony. Indeed, it was in part the confusion regarding

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[2] Respondent, Yellow Freight System, Inc., hereinafter will be referred to as "Yellow Freight."

[3] *See*, Plaintiff Depo. Exs. J, N, O, P, R, S, T, U, W, X, AA, BB & DD. Additional references to the record before the District Court will be noted parenthetically herein.

that assertion which led to the Court of Appeals' first opinion which had reversed the grant of summary judgment to Yellow Freight. However, after that factual misunderstanding was clarified by Yellow Freight in its petition for rehearing in the Court of Appeals, the Court properly reconsidered its finding and determined that summary judgment properly was entered in favor of Yellow Freight by the District Court. In addition, this Court should note that Petitioner has not disputed the validity of any of the warning letters issued to him prior or subsequent to his testimony.

Petitioner attempts to place significant emphasis on his claim that in a meeting on August 15, 1986, Mr. Marino, Yellow Freight's terminal manager, purportedly "alluded" to Petitioner's testimony in the *Few* case (Pet. 7). However, that fact was never clearly established by Petitioner, and is immaterial to the entry of summary judgment in this case. It is unrebutted that subsequent to the Joint State Grievance Committee decision upholding Petitioner's one-day disciplinary suspension, Mr. Marino met with him to discuss his performance problems (Plaintiff Depo. 14 & 17; Marino Depo. 176-81). During this meeting, Mr. Marino attempted to explain to Petitioner the method he used for monitoring city P&D driver performance through available computer data. However, before Mr. Marino could complete his explanation, Petitioner stood up, approached Mr. Marino, and stated that he did not have to listen to this "fucking bullshit." (Marino Depo. 180). Petitioner then left the meeting. Petitioner claims that Mr. Marino alluded to his testimony at the beginning of that meeting. However, Petitioner's own explanation of Mr. Marino's purported

comment does not support that claim.[4] Petitioner's strained assumption based on the vague comment purportedly made by Mr. Marino does not support his claim that Mr. Marino referred to his prior testimony, and as the Court of Appeals found, it certainly is insufficient to overcome the substantial evidence supporting the legitimacy of Yellow Freight's actions and avoid the appropriate entry of summary judgment.

Petitioner asserts that his work performance was "impeccable" (Pet. 7). However, as the Court of Appeals properly found, the contrary in fact was true. Petitioner demonstrated a variety of performance problems throughout the term of his employment with Yellow Freight, and after those problems became sufficiently severe, and Petitioner repeatedly failed to comply with the company's legitimate performance expectations, his employment properly was terminated. Although Petitioner appears to argue that a person employed for 13 years cannot demonstrate performance problems (Pet. 7, n.8), common sense indicates that an employee can exhibit unacceptable performance at any time in his career.

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[4] The following appears at pages 39-40 of Plaintiff's deposition taken on May 2, 1988:

> Q. Since the time you testified in the Few case, up until the time of your ultimate termination, did any one at the company, in a management position, ever mention to you, your testimony in the Few case?
>
> A. No. One time, Mr. Marino alluded to it in our August 15th meeting.
>
> Q. And what did Mr. Marino say?
>
> A. He called me in the office. He said, "We are here to talk about your work record and not what you think we are here to talk about," which I meant to understand, my testimony in the Few case.
>
> Q. Did you ask him if that is what he meant?
>
> A. No, I did not ask him.
>
> Q. That was just something you assumed?
>
> MR. ELFVIN: Objection.
>
> THE WITNESS: Correct.

Petitioner improperly asserts that Yellow Freight began surveillance of his activities for "no apparent reason" (Pet. 8). However, that assertion clearly disregards the unrebutted record evidence in this case. At this deposition, Mr. Marino explained at length how he monitored the various performance measures for all of the city P&D drivers and he noted a disturbing trend in Petitioner's numbers, particularly given the fact that he was working in an area with a large number of customers in close proximity to each other, and therefore, his numbers should have been much better (Marino Depo. 75-77 & 110-14). Indeed, Mr. Marino attempted to discuss that very issue with Petitioner on August 15, 1986, but Petitioner refused to listen to that explanation. Because the Teamsters Union, which represented the bargaining unit in which Petitioner was a member, refused to recognize production standards, it was necessary for Mr. Marino to attempt to ascertain the cause of the situation (Marino Depo. 102-04). Thus, he ordered the surveillance of Petitioner to determine if he was engaging in improper activities while performing his duties. Contrary to Petitioner's assertion (Pet. 8), Yellow Freight had placed other employees under similar direct surveillance, and in fact Petitioner had been placed under similar surveillance long before his testimony in the *Few* case (Marino Depo. 118-26; Alder Depo. 28). Significantly, Petitioner does not dispute the accuracy of the observations of his activities.

Petitioner asserts that on those occasions when he was being observed, he never deviated from his assigned duties, and that the only criticism of his performance was that he "took slightly more time" to perform a particular task (Pet. 8-9). However, the unrebutted evidence established that on October 23, 1986, Petitioner was observed engaging in a delay while

on overtime (Plaintiff Depo. 94 & Ex. TT; Marino Depo. 201-05). Petitioner was discharged based on that misconduct. Through the grievance process, Petitioner was reinstated, but the grievance committee imposed a disciplinary suspension without pay or benefits equivalent to the time off from the time of Petitioner's discharge through the date of the hearing on November 20, 1986, and an additional ten-day suspension, not allowing Petitioner to return to work until December 1, 1986 (Plaintiff Depo. 103 & Ex. ZZ; Marino Depo. 238-41). Thus, the grievance committee put Petitioner on notice that discipline for his misconduct was appropriate and that performance of that type was not acceptable. After Petitioner returned to work, on December 17, 1986, Mr. Marino again had Petitioner observed performing the same function at the same facility where he had previously engaged in a delay. On this second occasion, Petitioner engaged in an even longer delay (Plaintiff Depo. 104-07 & Exs. AAA & BBB; Marino Depo. 243-45). Based on the fact that Petitioner had engaged in the same misconduct at the same location that had led to his prior discharge, Mr. Marino again terminated Petitioner's employment. On this occasion, when his grievance was heard by the Joint State Grievance Committee, one of the members of that committee specifically asked Petitioner if he would engage in the same misconduct again if they returned him to work, and Petitioner indicated that he would (Plaintiff Depo. 110-11). Understandably, based on the fact that Petitioner had repeated the same misconduct for which the committee had imposed a severe disciplinary suspension less than two months earlier, and had expressly advised the committee that he would continue to engage in similar misconduct again if he was returned to work, the committee upheld Petitioner's discharge (Plaintiff Depo.

Ex. EEE). Clearly, Petitioner's misconduct goes beyond the minimal sort of misconduct he indicates to this Court in his Petition.

Petitioner asserts that the manifests of some other drivers demonstrate that they had similar delays (Pet. 9, n.9). However, Petitioner's summary comparison of average trip times for certain unidentified other drivers was never presented to either the District Court or the Court of Appeals below. Furthermore, the unrebutted evidence established that Petitioner was not disciplined for the amount of time shown on his manifests. Rather, he was disciplined for engaging in unreasonable delays based on specific observations. Petitioner has never presented any evidence that any other person under similar circumstances was treated in a dissimilar fashion.

Petitioner also states that Yellow Freight was unable to define what constituted "unreasonable abuse" of time (Pet. 9, n.9). However, the unrebutted evidence in this case established that the union refused to recognize production standards, and therefore, Yellow Freight could not establish any specific production standards. Indeed, Petitioner, himself, acknowledged that such a production standard would not be recognized by the union (Plaintiff Depo. 19). Rather, the company was compelled to deal with a perceived production problem by attempting to determine the cause of that problem through direct observation. That is precisely what the company did with respect to Petitioner, and that observation confirmed Petitioner's unacceptable performance and resulted in his termination.

In addition to the various factual misstatements discussed above, Petitioner also misstates certain of the proceedings in the courts below. Significantly, Petitioner fails to mention that the District Court gave him

substantial latitude in pursuing his claim, despite several procedural errors by Petitioner. Petitioner filed the present action to the District Court on February 13, 1987. However, because Petitioner had not satisfied the necessary prerequisites for bringing that action, the District Court granted Yellow Freight's motion to dismiss his complaint. While Petitioner's appeal of that order was pending before the Court of Appeals, Petitioner filed a second complaint with the District Court,[5] but he filed that complaint more than 90 days after his receipt of the right-to-sue notice from the Equal Employment Opportunity Commission. After Yellow Freight filed a motion to dismiss that second complaint with the District Court, in a clear effort to permit Petitioner to proceed with his claim despite his procedural errors, the District Court indicated that it would reconsider the earlier dismissal of his first complaint in the present case and allow him to proceed on that complaint.

Thereafter, the parties engaged in substantial discovery, including numerous depositions, written discovery, and providing Petitioner access to thousands of Yellow Freight's documents. Petitioner requested and obtained several extensions of established discovery deadlines from the District Court, often over Yellow Freight's objections. All discovery was completed by the parties prior to the submission of dispositive motions. Yellow Freight filed its motion for summary judgment with the District Court on October 14, 1988. Pursuant to the District Court's standing order, Petitioner's response was due on or before October 28, 1988. However, rather than file a responsive pleading, on October 31, 1988, Petitioner filed a belated motion for extension of time to

[5] Case No. C87-2208A.

file a response. On that same date, the District Court had issued an order granting summary judgment to Yellow Freight. However, in another effort to permit Petitioner to pursue fully his claim, the District Court subsequently vacated its prior entry of summary judgment, and reconsidered same in light of Petitioner's untimely opposition to the pending summary judgment motion. However, after reviewing Petitioner's opposition, the District Court found no reason to modify its previous conclusion that summary judgment should be entered in favor of Yellow Freight. Thus, contrary to Petitioner's assertion (Pet. 13), the District Court afforded him more than an adequate opportunity to produce evidence which would preclude the entry of summary judgment. However, Petitioner was never able to produce such evidence to the District Court, and therefore the entry of summary judgment properly was affirmed by the Court of Appeals.

Petitioner argues that summary judgment was granted by the District Court based on Yellow Freight's subjective reasons for his termination and his failure to succeed in the grievance process following his second discharge (Pet. 11). Certainly, the fact that Yellow Freight articulated legitimate, nondiscriminatory reasons for Petitioner's termination, and the fact that a joint grievance committee, made up of an equal number of management and union representatives familiar with the trucking industry, upheld his termination as being proper under the circumstances, were factors weighing in favor of the entry of summary judgment. However, more significantly, both the District Court and the Court of Appeals properly found that Petitioner had failed to produce any direct, circumstantial, comparative or other evidence that he was terminated in retaliation for his testimony in the *Few* case. The absence of such evidence

not only resulted in Petitioner's failure to establish the "causal connection" element of his *prima facie* case, but also his failure to establish that the company's overwhelming legitimate reasons were in any way pretextual. It is the absence of such evidence which warranted the entry of summary judgment in this case.

Petitioner argues that he presented proof of disparate treatment to the District Court in the form of hundreds of driver manifests (Pet. 12). However, as discussed above, the unrebutted evidence demonstrated that Petitioner was not disciplined for anything noted on his driver manifests. Furthermore, as Mr. Marino testified, the types of runs various drivers have varies significantly, thus making any attempted comparison of the data contained on such manifests largely worthless. Thus, both the District Court and the Court of Appeals properly concluded that the presentation of those manifests had no probative value.

Petitioner understandably is disappointed by the fact that the Court of Appeals initially reversed the entry of summary judgment, but then subsequently affirmed the entry of summary judgment on rehearing. However, as the Court of Appeals noted, after considering Yellow Freight's petition for rehearing, Petitioner's response thereto, and the record, the Court properly concluded that it relied on erroneous factual information in reaching its previous conclusion (Pet. A2). In its opinion of May 22, 1990, the Court of Appeals thoroughly reviewed the record evidence in this case, and rightly concluded that summary judgment was properly entered in favor of Yellow Freight. Based on its review, the Court of Appeals appropriately found that the trier of fact (which in this case would have been the District Court) could not reasonably find in favor of Petitioner on the evidence contained in the record.

REASONS FOR DENYING WRIT

Contrary to Petitioner's assertions, the decision by the Court of Appeals below does not raise the type of "special and important reasons" required by this Court's Rules for granting a petition for a writ of certiorari. Rule 10.1. Specifically, Petitioner has not established any conflict among the Courts of Appeals, that the Court of Appeals below departed from the accepted course of judicial proceedings, or that this case presents an important question of federal law which has not been settled by this Court. Rather, this case involves routine summary judgment proceedings where, after the completion of discovery, the District Court (and subsequently the Court of Appeals) reviewed the record evidence, applied the well-established summary judgment standard and the equally well-established Title VII[6] burdens to that record, and properly concluded that Petitioner failed to produce any evidence to support his retaliation claim. Thus, there is no significant issue presented in this case which would require review by this Court.

The issues presented by Petitioner are not fairly raised by the decision below. In an improper effort to support the issues raised in his Petition, Petitioner erroneously asserts that the District Court and Court of Appeals required him to produce direct evidence of motive and intent and a pattern of retaliatory conduct in order to avoid summary judgment (Pet. 17). However, Petitioner misstates the types of evidence which the lower courts indicated they would consider and which they found Petitioner failed to produce, by taking isolated statements wholly out of context. The District Court found that not only was

[6] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*

there no direct evidence of retaliatory motive, but there were no inferences which could be drawn to support such a finding (Pet. A32). Similarly, the Court of Appeals indicated that it would consider direct, indirect or circumstantial evidence of retaliatory motive, but that Petitioner failed to produce such evidence in response to Yellow Freight's summary judgment motion (Pet. A21-A22). Thus, the lower courts did follow this Court's teachings by permitting Petitioner to attempt to prove his Title VII retaliation claim by direct, indirect, or circumstantial evidence. However, the lower courts properly found that based on the record before them, Petitioner had failed to produce any such evidence of retaliation, and therefore summary judgment was properly entered against him. Petitioner's improper attempts to create issues for review by this Court should not be condoned.

Petitioner argues that a material factual dispute existed regarding Mr. Marino's purported comment to Petitioner on August 15, 1986 (Pet. 18, n.12). However, as discussed above, by Petitioner's own testimony, the purported statement by Mr. Marino is not the clear statement of discriminatory intent which Petitioner purports it to be. Furthermore, as the Court of Appeals properly found, when Mr. Marino's vague statement is weighed against the overwhelming legitimate reasons for Petitioner's termination, that purported statement does not create a genuine issue of material fact sufficient to avoid the entry of summary judgment (Pet. A6).

Petitioner argues that this Court should review this case to provide guidance to the lower courts on the summary judgment standard to be applied to a Title VII retaliation case. However, both the burdens of proof under Title VII, and the appropriate standard for

summary judgment, repeatedly have been addressed by this Court, and therefore, the lower courts have ample guidance regarding the resolution of such claims.

The burden of proof in a Title VII case frequently has been addressed by this Court. *See, U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 103 S. Ct. 1478 (1983); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1972). Under that well settled precedent, a Title VII plaintiff may seek to prove his claim by establishing an initial *prima facie* case of discrimination. However, if the employer produces a legitimate, nondiscriminatory reason for its action, the plaintiff bears the ultimate burden of proving that such reason is pretextual and that the employer had a discriminatory motivation. In addition, a Title VII plaintiff may also seek to prove a Title VII claim by ignoring the elements of a *prima facie* case and instead presenting direct evidence of discrimination. In either situation, once the employer presents a legitimate, nondiscriminatory reason for its actions, the Title VII plaintiff bears the ultimate burden of proving, by sufficient direct, circumstantial or statistical evidence, that the adverse employment action at issue was the result of unlawful discrimination. The foregoing proof requirements under Title VII are well-established, and they were properly followed by the District Court and Court of Appeals below.

In addition, this Court repeatedly has addressed the standard to be followed in ruling on a summary judgment motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See, Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S. Ct. 1598 (1970); *First Nat. Bank*

v. Cities Services Co., 391 U.S. 253, 88 S. Ct. 1575 (1968). More recently, in a trilogy of 1986 opinions, this Court reaffirmed the proper application of the summary judgment standard. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986). In those cases, this Court reaffirmed the appropriateness of summary judgment as a tool to eliminate claims which do not require trial.

> . . . One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.
>
> * * *
>
> . . . Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defense have no factual basis.

Celotex Corp. v. Catrett, supra, 477 U.S. at 323-24, 327 (footnote and citations omitted). As this Court previously has noted:

> . . . By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment;

> the requirement is that there is no *genuine* issue of *material* fact.
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. . . .

Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 247-48 (citation omitted; emphasis in original). As this Court further noted:

> . . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. . . .

Id., at 252. Thus, in a case involving a Title VII claim, on motion for summary judgment by the employer, the trial court must determine whether, drawing all reasonable inferences in favor of the plaintiff, the plaintiff has presented sufficient evidence of discrimination which would warrant a decision in favor of the plaintiff at trial. That standard is precisely the standard that the District Court and the Court of Appeals below applied in this case.

Petitioner argues that a Title VII retaliation case should be treated differently than other types of Title VII cases (Pet. 21-22). Indeed, Petitioner argues, without any authoritative support, that summary judgment should be barred in Title VII retaliation cases (Pet. 40). However, there is no support for either of Petitioner's arguments.

It is clear that Congress intended to protect individuals from retaliation for participating in Title VII claims.[7] However, there is not basis for arguing that an

[7] Petitioner's attempt to distinguish between different "categories" of retaliation (Pet. 20) is not supported by the statute or any case authority.

individual who participates in a Title VII claim should receive a greater degree of protection than other individuals who are protected under Title VII by virtue of their membership in a protected group under the statute. Indeed, for example, an individual who is claiming discrimination based on race is more likely to have his protected status known to his employer than an individual who participates in a Title VII claim. Furthermore, there is no legitimate basis for this Court to consider precluding the use of summary judgment in a retaliation case. If plaintiffs claiming Title VII retaliation are to be given such a unique status, that determination should properly be left to Congress, and not the courts.[8]

Petitioner argues that this Court has not addressed the issue of the non-moving party's burden on summary judgment where motive or intent are at issue (Pet. 22-26). However, two of this Court's recent cases concerning the summary judgment standard dealt specifically with issues of motive and intent, albeit in somewhat different contexts. *Anderson v. Liberty Lobby, Inc., supra* (proof of libel); *Matsushita Electric Industrial Co. v. Zenith Radio Corp., supra* (predatory pricing conspiracy). Although the specific quantum of proof required to establish motive and intent may vary depending on the substantive law at issue, this Court has nonetheless found that where sufficient evidence of such motive or intent is lacking, summary judgment properly may be entered. The Sixth Circuit Court of Appeals has correctly interpreted this Court's summary judgment trilogy as holding that issues of motive or

[8] In Title VII, Congress specifically vested jurisdiction in the District Courts. 42 U.S.C. §2000e-5(f)(3). Pursuant to the Federal Rules of Civil Procedure, all of those rules, including Rule 56, apply to proceedings in the District Courts. Rule 1, Fed. R. Civ. P. No exception exists for Title VII claims.

intent do not preclude summary judgment. *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). Furthermore, the Courts of Appeal have not exhibited any inability to follow this Court's precedent and apply same in the Title VII context.[9] Thus, it is unnecessary for this Court to revisit the appropriate summary judgment standard in the specific context of a Title VII retaliation claim.

Petitioner argues that because the Court of Appeals indicated that this was a "close case," that somehow precludes the entry of summary judgment (Pet. 25). However, Petitioner fails to note that the Court of Appeals went on to indicate that Petitioner had been given a substantial benefit of considerable doubt in this matter, but that based on the record evidence before it, the Court of Appeals properly concluded:

> . . . In view of the entire record at the time the district court made its decision on the summary judgment motion, we can find no error in the district court's conclusion that Canitia has not met this standard. The evidence, and any reasonable inference to be drawn therefrom, relied upon by plaintiff is insufficiently probative to overcome defendant's substantial proof in support of summary judgment. . . .

(Pet. A8). Clearly, the Court of Appeals construed all of Petitioner's evidence in the light most favorable to Petitioner. However, Petitioner failed to produce *any* evidence from which the Court could reasonably infer a

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[9] *See, e.g., Jamil v. Secretary, Dept. of Defense*, 910 F.2d 1203 (4th Cir. 1990); *White v. McDonnell Douglas Corp.*, 904 F.2d 456 (8th Cir. 1990); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989); *Jones v. Gerwens*, 874 F.2d 1534 (11th Cir. 1989); *Anderson v. Lewis Rail Service Co.*, 868 F.2d 774 (5th Cir. 1989); *Morgan v. Harris Trust & Sav. Bank*, 867 F.2d 1023 (7th Cir. 1989).

discriminatory motivation. The overwhelming and unrebutted record evidence clearly established that Petitioner was terminated for legitimate business reasons. Thus, summary judgment properly was entered in this case.

Petitioner argues that credibility should be assessed in a retaliation case (Pet. 26). However, credibility only becomes relevant when there is a genuine dispute as to a material fact in the case. In this case, no material facts were in dispute. Petitioner's attempts to create such disputed facts were wholly unpersuasive. A party cannot create a material dispute merely by stating one exists. Rather, a party must produce appropriate evidence to the District Court to demonstrate that such a dispute exists. In this case, Petitioner failed to produce any such evidence.

Petitioner again misstates the decision of the Court of Appeals by arguing that the Court gave unwarranted deference to the decisions of the Joint State Grievance Committee (Pet. 28-31). Plaintiff also argues that the decisions of the Joint State Grievance Committee should not be afforded arbitral finality. However, this Court previously has recognized that such joint committee decisions are afforded arbitral finality. *See, Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 (1976); *General Drivers, W. & H. v. Riss & Co.*, 372 U.S. 517, 83 S. Ct. 789 (1963). Furthermore, the Court of Appeals did not give undue deference to those decisions in this case. Those decisions merely were viewed as further support for Yellow Freight's legitimate reasons for terminating Petitioner. The Court did not rely solely on those decisions in reaching its conclusion. Rather, in keeping with this Court's opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011 (1974),

the Court of Appeals merely gave those decisions the appropriate weight under the circumstances of this case. Furthermore, Petitioner was seeking to challenge the validity of imposing discipline for what he felt was a vague standard regarding his conduct, and those joint committees (which are made up of union and company representatives familiar with the trucking industry) found that Petitioner's misconduct did indeed justify the discipline imposed.

Petitioner argues that the Court of Appeals' application of a "but for" test, as opposed to a "significant factor" test, was contrary to this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). However, this Court's decision in *Price Waterhouse* has no application in the present case. The thrust of the decision in *Price Waterhouse* dealt with the burden of proof placed on an employer in a so-called "mixed motive", case, where the plaintiff initially establishes that a discriminatory motive played a part in the employment decision at issue. In this case, Petitioner failed to offer any proof which would have shifted such a burden to Yellow Freight. Furthermore, as Justice White noted in his concurring opinion, any distinction in the foregoing standards appears to be merely semantic. *Id.*, 104 L. Ed. 2d at 293. Justice O'Connor similarly considered the distinction to be one of semantics. *Id.*, 104 L. Ed. 2d at 295, 297. There is no indication that the Court of Appeals improperly required Petitioner to prove that unlawful retaliation was the *sole* factor in his termination. Rather, under either a "but for" or a "significant factor" analysis, Petitioner was required to produce evidence that he would not have been terminated in the absence of his protective activity. As discussed above, Petitioner wholly failed to satisfy that burden.

Without stating the basis for his assertion, Petitioner argues that the Court of Appeals' decision is in conflict with the decision of the Ninth Circuit Court of Appeals in *Yartzoff v. Thomas*, 809 F.2d 1371 (9th Cir. 1987). However, a review of that decision indicates that no such conflict exists. In *Yartzoff*, although the Court did not apply this Court's summary judgment trilogy, it nonetheless found that the summary judgment rules apply to Title VII cases. *Id.*, at 1373. In addition, the Court indicated that as part of an initial *prima facie* Title VII retaliation claim, the plaintiff must establish a causal link between the protected activity and the employer's action. *Id.*, at 1375. The Court in that case went on to find that three of the plaintiff's retaliation claims were properly dismissed on summary judgment. The Court also noted that causation could be inferred from circumstantial evidence, such as proximity in time between the protected action and the employment decision at issue. *Id.*, at 1376. However, the Sixth Circuit Court of Appeals has similarly considered such evidence. *See, Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986); *Jackson v. Pepsi-Cola*, 783 F.2d 50, 54 (6th Cir. 1986), *cert. denied*, 478 U.S. 1006, 106 S. Ct. 3298 (1986). Although the Court in *Yartzoff* found that the evidence presented at the summary judgment stage precluded the grant of summary judgment as to certain of the plaintiff's other retaliation claims, the facts in that case vary significantly from those presented in this case. Unlike the plaintiff in *Yartzoff*, Petitioner did not present sufficient evidence from which the courts below could infer a retaliatory motive. Thus, contrary to Petitioner's assertion, the decision of the Court of Appeals in this case is not in conflict with the decision of another Court of Appeals.

Finally, Petitioner asserts that three of the four non-management employees who testified at the *Few* trial were subsequently terminated (Pet. 38, n.15). That misstatement of fact is indicative of Petitioner's entire approach to his Petition before this Court. That fact was never established in the record before the courts below, and Petitioner now improperly is seeking to raise this new alleged fact before this Court to support his Petition. Furthermore, even if that fact were true, without some evidence of the reason for those purported terminations, it would be irrelevant to Petitioner's claim.

This case does not present any issues which require review by this Court. Petitioner has not demonstrated that this case presents special and important reasons for his writ to be granted. Furthermore, this Court should not condone Petitioner's attempt to create issues for review by misstating facts, attempting to assert facts found nowhere in the record, and misstating the findings of the courts below.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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